

Supreme Court, U.S.

F I L E D

SEP 1 1989

No. 89-137

JOSEPH F. SPANIOL, J.
CLERK

In The
Supreme Court of the United States
October Term, 1989

DONALD A. LOWRY,

Petitioner,

v.

BANKERS LIFE AND CASUALTY
RETIREMENT PLAN, ET AL,

Respondents.

**PETITIONER'S SUPPLEMENTAL BRIEF
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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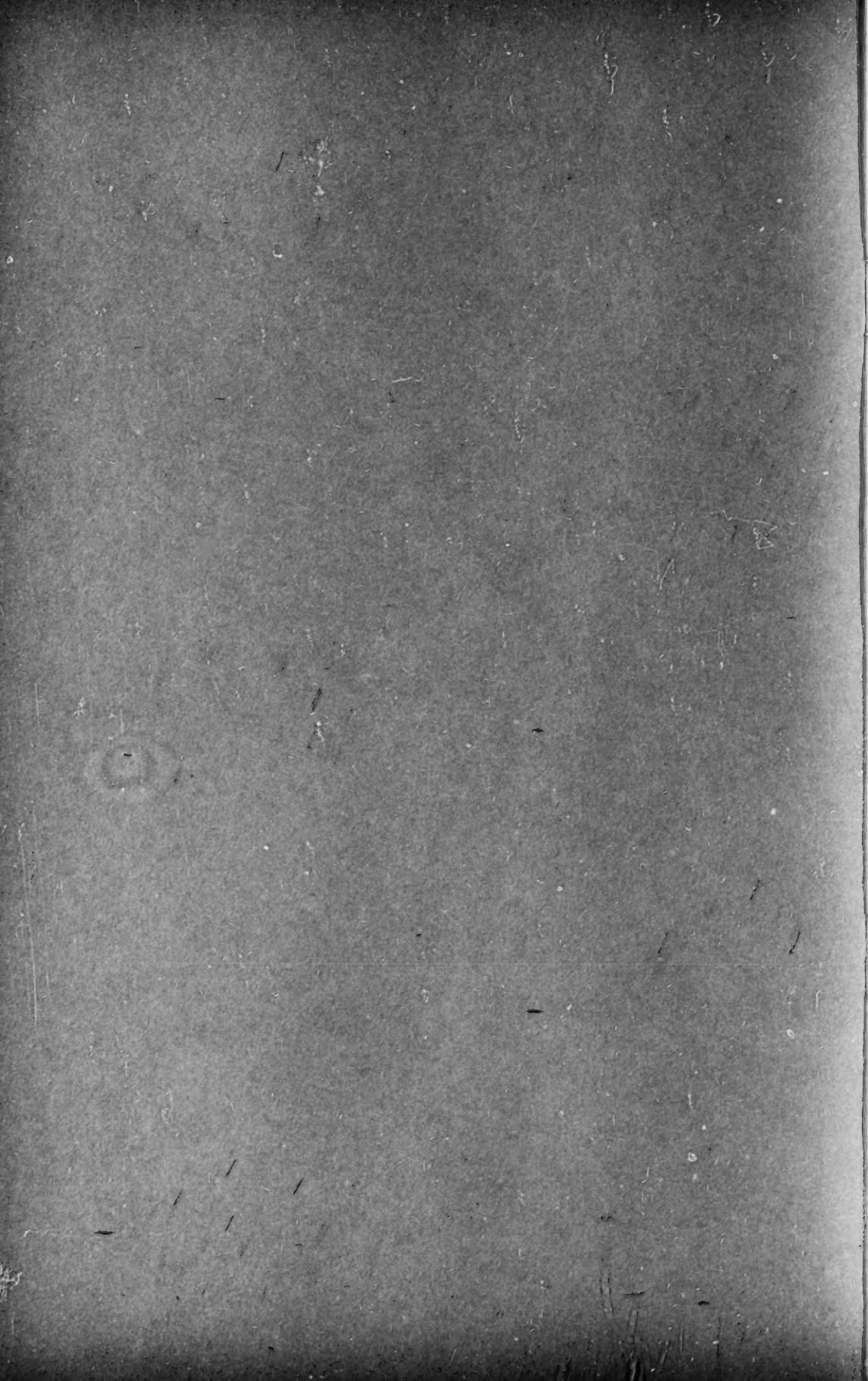


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TO THE SUPREME COURT OF THE UNITED STATES:

NOW COMES Petitioner, Donald A. Lowry, and files this his Supplemental Brief in Support of his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and in support of same would show the Court the following:

I.

**THE COURT OF APPEALS ERRED IN HOLDING
PETITIONER WAIVED THE ISSUE OF ADMINIS-
TRATOR BIAS.**

Since filing his Petition for Writ of Certiorari in late July in this case, Petitioner has discovered the newly

published case of *Pierre v. Connecticut General Life Insurance Company*, 877 F.2d 345 (5th Cir. 1989), decided on rehearing on July 3, 1989 by the United States Court of Appeals for the Fifth Circuit. Petitioner believes such case supports the granting of his Petition for Writ of Certiorari and should be considered by this Honorable Court.

Pierre v. Connecticut General Life Insurance Company, supra, was originally decided by a different panel of the Fifth Circuit on February 23, 1989. In that opinion, found at 866 F.2d 141 (5th Cir. 1989), the plaintiff in the case, Mrs. Pierre, brought forth an appeal from a denial of an ERISA benefits claim. In the original opinion, the Fifth Circuit noted that Mrs. Pierre had raised the conflict of interest shown by the fact the insurance company, Connecticut General, was also the decision-making fiduciary of the ERISA plan. However, the Fifth Circuit refused to consider such bias or self-interest of the administrator and expressly held the arbitrary and capricious standard of review was applicable *even when biased administrators act in a conflict of interest position*. There the Court stated:

Mrs. Pierre contends that the arbitrary and capricious standard is inappropriate in this case because of the self-interest Connecticut General has in denying benefits. While Mrs. Pierre's concern is not without merit, *this circuit's rule follows the weight of authority applying the arbitrary and capricious standard in ERISA cases. (citations omitted) The standard applies equally when the insurance carrier is the decision-making fiduciary. (citations omitted)* The district court correctly applied an arbitrary and capricious standard of review.

Pierre v. Connecticut General Life Insurance Co., 866 F.2d 141 (5th Cir. 1989) at p. 143. (Emphasis added)

With the announcement of this Honorable Court's decision in *Bruch*, Mrs. Pierre sought rehearing which, on July 3, 1989, was granted. *Pierre v. Connecticut General Life Insurance Co.*, 877 F.2d 345 (5th Cir. 1989). The Court stated:

Our previous decision, 866 F.2d 141 (1989), is vacated and the cause is remanded to the district court for reconsideration in light of the recent United States Supreme Court decision in *Firestone Tire and Rubber Company v. Bruch*, ___ U.S.___, 109 S.Ct. 948, 103 L.Ed.2d (1989).

Pierre v. Connecticut General Life Insurance Company, supra, at p. 346.

The relevancy of this case to Petitioner's case is clearly seen when one examines language used by the Fifth Circuit Court of Appeals to explain its reasons for denying Petitioner's post-*Brunch* rehearing motion. In headnote 3 of the opinion the Fifth Circuit stated:

The appellant cannot justify raising the conflict of interest argument for the first time in his petition for rehearing. A plan administrator's conflict of interest is clearly material to judicial review of our circuit's pre-*Bruch* arbitrary and capricious standard. See Appendix to petition pages 7B and 8B. (Emphasis added)

Based upon this assertion that the Fifth Circuit's pre-*Bruch* standards allowed for modification or judicial relaxation of the absolute judicial deference seen in the

arbitrary and capricious review standard, the Fifth Circuit denied rehearing holding that Lowry waived such point by failing to raise it before *Bruch*. However, as can be seen by review of *Pierre*, even those Fifth Circuit ERISA claimants who did raise administrator bias and conflicts of interest prior to *Bruch* were met with the same result, to wit: the Fifth Circuit's adamant refusal to consider administrator bias as a basis to modify the arbitrary and capricious standard of review under ERISA.

Petitioner submits that under such circumstances, it was inequitable and unjust for the Fifth Circuit to hold a failure of Petitioner to raise the issue of the Respondent administrator's bias waived his post-*Bruch* right to complain of same when published opinions of the same Fifth Circuit court establish it had steadfastly refused to consider administrator bias when it was timely raised. As such, this Honorable Court should hold Petitioner has not waived his *Bruch*-created right to complain of administrator bias in this case.

Respectfully submitted,

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